

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHARLES STOKES</b>	)	
Claimant	)	
VS.	)	
	)	
<b>WASTE MANAGEMENT OF WICHITA</b>	)	Docket No. 213,595
Respondent	)	
AND	)	
	)	
<b>CONTINENTAL NATIONAL AMERICAN GROUP</b>	)	
Insurance Carrier	)	

**ORDER**

Both claimant and respondent appeal Administrative Law Judge John D. Clark's November 15, 1999, Review and Modification Award. The Appeals Board heard oral argument in Wichita, Kansas, on March 10, 2000.

**APPEARANCES**

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, John David Jurcyk of Lenexa, Kansas.

**RECORD**

The Appeals Board has considered the record listed in the Review and Modification Award. Additionally, the Appeals Board has considered the record listed in the initial June 27, 1997, Award.

**STIPULATIONS**

The Appeals Board, with one exception, adopts the stipulations listed in the Review and Modification Award. At oral argument, the parties stipulated that the correct date the

claimant filed his Application for Review and Modification was May 17, 1999, instead of July 23, 1999, as listed in the Review and Modification Award stipulations.

### **ISSUES**

The Administrative Law Judge modified the initial June 27, 1997, Award from an eight percent permanent partial general disability, based on claimant's permanent impairment of function, to a 54 percent permanent partial general disability based on a work disability.

Claimant appealed and questions only the portion of the Administrative Law Judge's computation of the Award that pertains to the number of weeks and the total sum due and owing as of November 12, 1999. The Administrative Law Judge found there was 16.14 weeks of permanent partial disability compensation at the rate of \$326 per week in the sum of \$5,261.64 due and owing as of November 12, 1999. Claimant contends the correct amount due and owing should be 49.1 weeks of permanent partial disability compensation at the rate of \$326 per week for a total sum due of \$16,000.60. Claimant argues the number of weeks due and owing should be computed for the period between the effective date of the Review and Modification Award of December 14, 1998,<sup>1</sup> and the date the Review and Modification Award was entered on November 15, 1999.

Conversely, the respondent contends claimant failed to prove he is entitled to a modification of the initial June 27, 1997, Award. Respondent argues, because claimant's physical disability has not changed, he is not entitled to a modification of the Award.

Furthermore, even if claimant is entitled to a higher work disability award, respondent argues, since claimant's physical condition has not changed, claimant was eligible for a work disability immediately after he was due the weeks he was temporarily and totally disabled and the weeks due for the eight percent permanent partial general disability award. Respondent asserts claimant should be credited for those work disability weeks but is not entitled to the weekly compensation payable for the work disability until after the date the respondent laid claimant off and he was not earning 90 percent or more of his gross average weekly wage.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the brief of the claimant, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

#### **FINDINGS OF FACT**

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<sup>1</sup>The claimant argued this date was the effective date of the Review and Modification Award. But six months preceding the stipulated May 17, 1999, date that claimant filed his application is November 17, 1998, and not December 14, 1998.

1. On January 7, 1996, claimant slipped on some ice and fell while working as a trash hauler for the respondent. At the time of the accident, claimant had been employed by the respondent since May 2, 1989.
2. After the fall, claimant had complaints of pain in his neck and pain radiating down his left arm.
3. Claimant was taken off work, and respondent provided claimant with medical treatment for his injuries with a variety of medical providers.
4. Although one physician recommended surgery, claimant did not have surgery but was treated conservatively with physical therapy, injections, and medication.
5. Respondent eventually returned claimant to work at a comparable wage.
6. In the initial June 27, 1997 Award, the Administrative Law Judge awarded claimant 22.86 weeks of temporary total disability compensation and 32.57 weeks of permanent partial disability compensation based on an eight percent permanent impairment of function. Those weeks were paid at \$326 per week for a total Award of \$18,070.18. This amount was all due and owing the claimant as of the date of the Award. In fact, computing those weeks from the January 7, 1996, accident date, the Award would have been all due and owing as of January 29, 1997.
7. Since the June 27, 1997, Award, claimant continued to have symptoms and received continued medical treatment for his cervical injury with one of his treating physicians, neurosurgeon Paul S. Stein, M.D. Additionally, claimant saw Dr. Klafta on one occasion on April 28, 1999.
8. In 1998, claimant was performing accommodated light work for the respondent. On June 16, 1998, at the respondent's request, claimant was examined and evaluated by physiatrist Philip R. Mills, M.D. Claimant testified the purpose of the examination was to obtain a release for claimant to return to regular work. But Dr. Mills did not recommend claimant be taken off the light-work duty. In fact, Dr. Mills actually increased claimant's permanent restrictions.
9. Thereafter, respondent notified claimant it could no longer accommodate his permanent restrictions and laid him off work on September 28, 1998.
10. At claimant's attorney's request, vocational expert Jerry D. Hardin interviewed claimant on November 30, 1998. Mr. Hardin developed a list of work tasks claimant had performed in the 15 year period preceding his accident date.
11. Mr. Hardin also found, based on claimant's current work restrictions, education, training, and past work experience, that claimant was capable of earning \$240 to \$280 per

week. At the time respondent laid claimant off work on September 28, 1998, he was earning \$650 per week. As of the date of the regular hearing, claimant was not gainfully employed.

12. Pedro A. Murati, M.D., was the only physician who testified in this proceeding. At claimant's attorney's request, Dr. Murati examined and evaluated claimant on October 8, 1998. Dr. Murati had also seen claimant on November 4, 1996, and his testimony was part of the record for the initial June 27, 1997, Award.

13. Dr. Murati diagnosed claimant with a posterolateral mild disc protrusion at C5-6. As a result of Dr. Murati's 1996 examination, he had assessed claimant with 21 percent whole body permanent functional impairment. The doctor found that claimant's permanent functional impairment had not increased since 1996.

14. In 1996, Dr. Murati did not place any permanent restrictions on claimant because claimant had not made a request for restrictions, as he was able to tolerate his job at that time.

15. But this time, restrictions were requested, and Dr. Murati restricted claimant from climbing ladders, crawling, and to avoid placing his neck in awkward positions. He limited claimant's lifting, carrying, pushing, and pulling to 35 pounds occasionally, 20 pounds frequently, and 10 pounds constantly. Dr. Murati opined that these permanent restrictions would have been the same restrictions he would have placed on claimant in 1996.

16. At Dr. Murati's deposition, he was shown the work task list that Mr. Hardin had completed and claimant had identified at the regular hearing. Utilizing claimant's permanent restrictions, Dr. Murati opined that claimant had a 46 percent loss of ability to perform previous work tasks.

#### **CONCLUSIONS OF LAW**

1. K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.<sup>2</sup> The review and modification statute, K.S.A. 44-528, does not require the worker's disability to change for an award to be modified.<sup>3</sup> If there is a change in the claimant's work disability, then the award is subject to review and modification.<sup>4</sup>

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<sup>2</sup>See Nance v. Harvey County, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

<sup>3</sup>See Redgate v. City of Wichita, 17 Kan. App. 2d 253, 263, 836 P.2d 1205 (1992).

<sup>4</sup>See Garrison v. Beech Aircraft Corp., 23 Kan App. 2d 221, 225, 929 P.2d 788 (1996).

2. In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.<sup>5</sup>

3. Permanent partial general disability is measured by functional impairment for employees who return to work at a wage that is 90 percent or more of the wage the employee is earning at the time of the injury. If the employee is not earning 90 percent of the pre-injury wage, a higher work disability may be awarded.<sup>6</sup>

4. K.S.A. 44-510e(a) defines work disability as the average of wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. Here, after claimant's January 7, 1996, accidental injury, claimant returned to work for the respondent at a comparable wage, and his permanent partial general disability award was eight percent based on his functional impairment rating. But on September 28, 1998, respondent laid claimant off work from an accommodated light-duty job because it could no longer accommodate claimant's permanent work restrictions.

6. At the time of the layoff, the Appeals Board finds the claimant was then entitled to a work disability if higher than his functional impairment rating. The Administrative Law Judge found claimant had proven, through Dr. Murati's testimony, that he had a 46 percent work task loss. The Administrative Law Judge also found, based on Mr. Hardin's opinion, that claimant had a 62 percent wage loss. As required, the Administrative Law Judge averaged those two components of the work disability test together equalling a 54 percent work disability. The Appeals Board concludes the 54 percent work disability is supported by the record and is, therefore, affirmed.

7. The respondent cites the Watkins case as authority for its argument that an injured worker who is returned to work earning a comparable wage and then is laid off by the respondent is not entitled to a work disability, absent a change in the worker's physical condition.<sup>7</sup> But the Appeals Board finds Watkins is distinguishable from this case. The claimant in Watkins, after his injury, returned to work at his regular job earning a

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<sup>5</sup>Morris v. Kansas City Bd. of Public Util., 3 Kan App. 2d 527, 531, 598 P.2d 544 (1979).

<sup>6</sup>See K.S.A. 44-510e(a).

<sup>7</sup>See Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 839, 936 P.2d 294 (1997).

comparable wage. The Court held that then by definition the worker does not have a work disability. If the employee subsequently loses the job for economic or other reasons, the loss can not create a work disability, absent a change in the worker's physical condition.

In this case, the Appeals Board finds that Watkins does not apply because claimant was performing an accommodated light-duty job at the time he was laid off by the respondent. Furthermore, claimant was not laid off for economic reasons but was laid off specifically because of his work-related injuries. Accordingly, although his physical condition had not changed, claimant was no longer earning 90 percent or more of his average weekly wage, and is, therefore, entitled to a higher work disability.

8. Respondent also contends that claimant failed to prove the respondent laid him off because of permanent work restrictions imposed by Dr. Philip Mills. Respondent points out that neither Dr. Mills' medical records nor his testimony are part of the review and modification record. Therefore, the respondent argues there is no medical evidence admitted in the record to prove the reason respondent laid claimant off of work.

The Appeals Board disagrees with the respondent's argument and finds claimant, without objection, testified the reason respondent released him from work was because respondent could no longer accommodate claimant's permanent work restrictions. Claimant's testimony was uncontradicted as respondent did not have any of its representatives testify. The Appeals Board finds claimant's testimony was reasonable and there was no showing that the testimony was untrustworthy.<sup>8</sup> Thus, the Appeals Board concludes claimant's testimony is persuasive and proved the reason respondent laid claimant off work was that respondent could no longer accommodate claimant's restrictions.

9. If claimant is entitled to a work disability, respondent argues, since his physical condition did not change, claimant was entitled to the work disability immediately after he was entitled to temporary total disability benefits and the eight percent permanent partial general disability benefits. Thus, respondent contends the work disability weeks should begin to run immediately after the weeks claimant was entitled to the eight percent permanent partial general disability. But respondent argues claimant is not entitled to any compensation for those work disability weeks until he was laid off and was not earning at least 90 percent or more of his average weekly wage.

The Appeals Board finds that this argument of the respondent should also fail. As previously noted, claimant was not entitled to a work disability until respondent laid him off work on September 28, 1998. Before that date, claimant was earning 90 percent or more of his pre-injury average weekly wage, and his permanent partial disability benefits were limited to his functional impairment. The June 27, 1997, Award had been paid in full as of

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<sup>8</sup> See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

the date of the Award. The Appeals Board concludes, because claimant was not eligible for the higher work disability until he was laid off, the work disability did not commence until the day after the lay off. Accordingly, the work disability weeks do not relate back to the last week the eight percent disability was paid.

10. The Appeals Board agrees with the claimant's assertion that the Administrative Law Judge erred in computing the portion of the Review and Modification Award that pertains to the number of weeks due and owing.

The Appeals Board has set forth below the computation of the Review and Modification Award reflecting the permanent partial disability increase from eight percent to 54 percent. This computation also includes the weeks and total amount due and owing as of March 30, 2000.

11. The parties stipulated at oral argument that claimant filed his Application for Review and Modification on May 17, 1999. K.S.A. 44-528(d) provides that the effective date of any modification shall not be more than six months before the date the application was filed. Thus, in this case, the effective date of the modification is November 17, 1998.

Accordingly, even though claimant was laid off on September 28, 1998, he is not entitled to the higher work disability until November 17, 1998, the effective date of the Review and Modification Award. After taking into consideration the 22.86 weeks of temporary total disability compensation and the 32.57 weeks of permanent partial general disability compensation paid the claimant, the Appeals Board finds claimant is entitled to 187.29 weeks of permanent partial general disability compensation based on the 54 percent work disability. But because the effective date of the Review and Modification Award is November 17, 1998, instead of September 29, 1998, the day after claimant was laid off, or a period of seven weeks, claimant's review and modification award is for 180.29 weeks, instead of 187.29 weeks, at \$326 per week for a total sum of \$58,774.54. As of March 30, 2000, there will be due and owing 71.43 weeks of permanent partial disability at \$326 per week for a total sum of \$23,286.18.

12. All other findings and conclusions contained in the Review and Modification Award are adopted by the Appeals Board to the extent they are not inconsistent with this Order.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the November 15, 1999, Review and Modification Award entered by Administrative Law Judge John D. Clark should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Charles Stokes, and against the respondent, Waste Management of Wichita, and its insurance

carrier, Continental National American Group, for an accidental injury sustained on January 7, 1996.

Commencing November 17, 1998, the effective date of the Review and Modification Award, claimant is entitled to 180.29 weeks of permanent partial disability compensation at the rate of \$326 per week for a 54% permanent partial general disability, making a total award of \$58,774.54.

As of March 30, 2000, there is due and owing claimant 71.43 weeks of temporary total disability compensation at the rate of \$326 per week for a total sum of \$23,286.18 which is ordered paid in one lump sum. The remaining balance of \$35,488.36 is to be paid for 108.86 weeks at the rate of \$326 per week until fully paid or further order of the Director.

The Appeals Board adopts all remaining orders contained in the Review and Modification Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
John David Jurcyk, Lenexa, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director